Supreme Court, U.S.
FILED
SEP 16 2002
CLERK

No. 02-260

IN THE

Supreme Court of the United States

MILLCRAFT-SMS SERVICES, L.L.C. and
ARIZONA CHEMICAL COMPANY,
Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as
Commissioner of the State of Alabama
Department of Revenue,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICUS CURIAE* COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

DOUGLAS L. LINDHOLM *
President/Executive Director
DIANN L. SMITH, General Counsel
STEPHEN P.B. KRANZ, Tax Counsel
WILLIAM D. PELTZ, Chair
BOBBY L. BURGNER, Vice-Chair
J. HUGH MCKINNON, Counsel
Lawyers' Coordinating Subcommittee
COUNCIL ON STATE TAXATION
122 C St., N.W., Suite 330
Washington, D.C. 20001
(202) 484-5215

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

20 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
SUMMARY OF THE ISSUE	1
INTEREST OF *AMICUS CURIAE*	3
REASONS FOR GRANTING THE PETITION	5
A. Alabama's Retroactive With-drawal Of A Procedure To Obtain a Remedy For An Illegally Collected Tax Violates The Due Process Clause.	5
B. Aggrieved State Taxpayers Face Limited Forums For Challenging Parochial State Court Decisions.	6
C. The States' Continued Failure To Provide Constitutionally Adequate Remedies Results In a Real Loss of Money and Time by Taxpayers	7
ARGUMENT	9
Under The Due Process Clause Of The United States Constitution, The Alabama Supreme Court Unconstitutionally Deprived The Petitioners Of Their Property By Retroactively Removing Previously Established Procedures On Which The Petitioners Had Relied To Remedy An Unconstitutional Tax	9
I. DUE PROCESS REMEDY RULES IN STATE TAX CASES	9
II. ALABAMA'S REMEDY DESIGN AND APPLICATION	11

TABLE OF CONTENTS—Continued

Page

III. ALABAMA'S RETROACTIVE WITHDRAWAL OF A PROCEDURAL REMEDY FOR AN ILLEGALLY COLLECTED TAX VIOLATES THE DUE PROCESS CLAUSE 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES Page

Atchison, T. & S.F.R. Co. v. O'Conner, 223 U.S. 280 (1912) 9

California v. Grace Brethren Church, 457 U.S. 393 (1982) 7

Ford Motor Co. v. Dep't of Treasury of Indiana, 323 U.S. 459 (1945) 7

Fulton Corp. v. Faulkner, 516 U.S. 325 (1996) .. 8

Graves v. McDonough, 88 So. 2d 371 (Ala. 1956) 11

Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1992) 9

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990).....4, 9, 10, 13

McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, 524 So. 2d 1000 (1988) 10

Milwaukee Safeguard Ins. Co. v. Selcke, 754 N.E.2d 349 (Ill. App. 2001), *cert. denied*, U.S., No. 01-1311 (2002) 4

Monroe v. Valhalla Cemetery Co., 749 So. 2d 470 (Ala. Civ. App. 1999), *cert. denied*, (Ala. Nov. 5, 1999), *and cert. denied*, 529 U.S. 1022 (2000)..... 6, 11

Newsweek, Inc. v. Department of Rev. of the State of Florida, 522 U.S. 442 (1998) 4, 5, 7, 10

In the matter of Panhandle Eastern Pipeline Co., et al., Kan. Supreme Ct., No. 86,277 (2002) 14

Patterson v. Gladwin Corp., et al., AL Sup. Ct., No. 1001747 (5/17/02) 5

Reich v. Collins, 513 U.S. 106 (1994) 5, 10, 13, 14

Sharper Image. v. Department of Revenue, 704 So. 2d 657 (Fla. Dist. Ct. App. 1997), *cert. denied*, 526 U.S. 1016 (1999) 4

TABLE OF AUTHORITIES—Continued

Page

Sizermore v. Rinehart, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993).. 6

South Central Bell Telephone Co. v. Alabama, 526 U.S. 160 (1999).....2, 3, 4, 11, 12

White v. Reynolds Metals Co., 558 So. 2d 373 (Ala. 1989), *cert. denied, Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990) 2

UNITED STATES CONSTITUTION

U.S. Const. Amend. XIV, § 1 9

U.S. Const. Amend. XI 6, 7

STATUTES

28 U.S.C. § 1341..... 6

Ala. Code 1975 §§ 40-14-40, and – 4, repealed by Act No. 665, 1999 Ala. Acts 131, Second Special Session..... 2, 3

Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, Ala. Code 1975, § 40-2A-1 *et seq.* 11

IN THE

Supreme Court of the United States

No. 02-260

MILLCRAFT-SMS SERVICES, L.L.C. and
ARIZONA CHEMICAL COMPANY,
Petitioners,

v.

CYNTHIA UNDERWOOD, in her official capacity as
Commissioner of the State of Alabama
Department of Revenue,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF *AMICUS CURIAE* [1] COUNCIL ON STATE TAXATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

SUMMARY OF THE ISSUE

A state's refusal to timely fix an unconstitutional tax and its subsequent failure to provide the constitutionally

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Written consents for the filing of this brief have been obtained from the Petitioner and Respondent and filed with the Clerk of the Court.

mandated remedies to its aggrieved taxpayers serves neither the individual taxpayers involved nor the greater populace to which the state is ultimately responsible. Once a mistake has been made, a state needs to fix it promptly and not allow it to fester and spread. Alabama failed to fix its mistake and now fails to remedy the mistake it made.

The history of this case could be classified as a "comedy of errors" if not for the fact that the results are painfully serious. Alabama imposed an unconstitutional franchise tax on out-of-state corporations for decades. Ala. Code 1975 §§ 40-14-40, and –4, repealed by Act No. 665, 1999 Ala. Acts 131, Second Special Session. The Alabama Supreme Court let this tax stand, not once, but twice. *White v. Reynolds Metals Co.*, 558 So. 2d 373 (Ala. 1989), *cert. denied, Reynolds Metals Co. v. Sizemore*, 496 U.S. 912 (1990); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) (overruling Alabama Supreme Court upholding constitutionality of Alabama foreign franchise tax). When this Court finally reviewed the tax, after denying review in Alabama's first decision upholding the tax, the tax was struck down 9-0. *South Central Bell*, 526 U.S. 160. Alabama knew the problems with its tax and never even argued to this Court that its tax was constitutional! Alabama continued to collect the tax long after it recognized its inconstitutionality and denied the taxpayers' request to hold the contested funds in escrow by promising that all of the taxpayers' remedies at law would remain available. Now, after having lost on the constitutionality, Alabama claims for the first time that a 45 year precedent relied upon by Alabama taxpayers and lower courts is not the appropriate procedure for taxpayers to obtain a remedy for the illegally collected tax. Alabama, after having already reaped the rewards of this Court's decision not to review the tax the first time around, now continues to avoid the consequences by imposing unconstitutional procedural blockades to relief. COST hopes that this Court will not let Alabama get away with this.

INTEREST OF THE *AMICUS CURIAE*

The Council On State Taxation (COST) submits this brief as *amicus curiae* in support of Petitioners in the above captioned matter. COST is a non-profit trade association organized in 1969 as an advisory committee to the Council of State Chambers of Commerce.[2] COST, which was separately incorporated on January 1, 1992, has a membership of over 540 multistate corporations involved in interstate and international commerce. COST's objective is to preserve and promote equitable and nondiscriminatory state and local taxation of its members and all multi-jurisdictional business entities.

The present case involves Alabama's retroactive withdrawal of a previously available procedural remedy for taxpayers seeking refunds of a franchise tax declared unconstitutional by this Court. Alabama's former franchise tax[3] was imposed on a different base for out-of-state taxpayers than for in-state taxpayers. The result was that out-of-state taxpayers frequently bore a heavier tax burden than they would have if they had been incorporated in Alabama. In 1999, this Court determined that Alabama's franchise tax was unconstitutional. *South Central Bell*, 526 U.S. 160.[4]

---

[2] COST was previously the Committee On State Taxation but changed its name to the Council On State Taxation by vote of its membership November 6, 2001.

[3] In 1999 the Alabama legislature repealed the unconstitutional tax and adopted a new business privilege tax on all corporations doing business in the State. Act No. 665, 1999 Ala. Acts 131, Second Special Session.

[4] *South Central Bell* is the predecessor to the case at issue here. The taxpayers in *South Central Bell* settled their claims individually with the state following this Court's ruling and their case was dismissed. This case then took the lead regarding the establishment of the remedy for the unconstitutional tax.

Three later,[5] the State continues to add insult to injury by refusing to review Petitioners' claims for a remedy. This case raises the issue of what is the constitutional standard by which states are judged in providing procedural remedies for their discriminatory tax schemes and as such is at the core of COST's mission.

Many of COST's members are engaged in business in the State of Alabama and many have paid the unconstitutional franchise tax. Thus, these members have a particular interest in the remedial landscape in the State. Further, all of COST's members are subject to a variety of potentially invalid state taxes. These members have a continuing interest in the availability of clear and certain procedural and substantive remedies to such illegal taxes. COST and its members have seen first hand the financial loss and confusion that results when taxpayers are denied their constitutional remedies for an invalid tax. As a result of this continuing interest in the problems of remedies for invalid taxes, COST has performed in-depth studies of the law of state tax remedies and continues to monitor the problem. In furtherance of this study and monitoring, COST has filed *amicus curiae* briefs with this Court in numerous other cases concerning the scope of the Due Process Clause requirements related to remedying unconstitutionally collected taxes. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990); *Newsweek, Inc. v. Department of Rev. of the State of Florida*, 522 U.S. 442 (1998); *Sharper Image. v. Department of Revenue*, 704 So. 2d 657 (Fla. Dist. Ct. App. 1997), *cert. denied*, 526 U.S. 1016 (1999); and *Milwaukee Safeguard Ins.*

---

[5] One of the many truly galling things about this case is that the State basically agreed that its franchise tax was unconstitutional before even arguing its case to this Court by failing to present any argument supporting its constitutionality. In its argument in *South Central Bell*, like in the case *sub judice*, the State tried to hide behind sovereign immunity to shield it from its constitutionally mandated obligations.

Co. v. Selcke, 754 N.E.2d 349 (Ill. App. 2001), *cert. denied*, U.S., No. 01-1311, (2002). In fact this Court endorsed the "bait and switch" language first proposed by COST in its amicus brief in *Reich v. Collins*. Today, COST and its members remain concerned about the states' continuing reluctance, as evidenced by the Alabama Supreme Court's opinion in this case, to provide remedies that comport with Due Process. Therefore, COST and all of its members have an interest in this case and their knowledge can add to the discussion of the issue.

REASONS FOR GRANTING THE PETITION

A. Alabama's Retroactive Withdrawal Of A Procedural Remedy For An Illegally Collected Tax Violates The Due Process Clause.

This Court is asked once again to overturn a state court's decision to ignore Due Process requirements for remedies associated with illegally collected state taxes. As in the past, a state is attempting to avoid the consequences of imposing an unconstitutional tax by retroactively limiting the procedural remedies available to injured taxpayers seeking recovery of the taxes paid. This Court has specifically forbidden such "bait and switch" tactics in *Reich v. Collins*, 513 U.S. 106 (1994) and applied the prohibition again in a summary reversal in *Newsweek*, 522 U.S. 442. Thus, this Court has shown a strong predilection for limiting states' disobedience in this area.

Notwithstanding this Court's explicit, recent, and repeated prohibition on retroactively changing the available procedural remedies with the effect of denying a taxpayer meaningful backward looking relief for an unconstitutionally collected tax, the Alabama court in this case managed to conclude that *Reich* does not apply here because a "reasonable taxpayer would have thought that [the administrative remedies] represented . . . the exclusive remedy for unlawful franchise

taxes." *Patterson v. Gladwin Corp., et al.*, AL Sup. Ct., No. 1001747 (5/17/02) (emphasis in original)(quoting *Reich v. Collins*). The implausibility of this analysis is evidenced by the fact that *two* Alabama appellate courts had held previously that the procedural remedy chosen by the Petitioners *is* available. *Monroe v. Valhalla Cemetery Co.*, 749 So. 2d 470, 473 (Ala. Civ. App. 1999), *cert. denied*, (Ala. Nov. 5, 1999), *and cert. denied*, 529 U.S. 1022 (2000); *Sizermore v. Rinehart*, 611 So. 2d 1064, 1067-68 (Ala. Civ. App. 1992), *writ quashed as improvidently granted*, 611 So. 2d 1069 (Ala. 1993). Thus, it is not just the Petitioners or their advisors or all of the taxpayers over the past 45 years that have used the procedure, now retroactively withdrawn by the Alabama Supreme Court, who thought the procedural remedy rejected by the Alabama Court was available. The judges of Alabama's intermediate appellate court system came to the same conclusion. Unable to distinguish these appellate court cases, the Alabama Supreme Court resorted to overruling them. By doing so, the Alabama Supreme Court basically held that the judges on those courts did not represent "reasonable taxpayers". The folly of such a conclusion is strong evidence that the Alabama Supreme Court reached its result first—no refunds—and then sought a theory by which to accomplish the result—procedural path chosen by Petitioners invalid. COST requests this Court not to allow this growing practice.

B. Aggrieved State Taxpayers Face Limited Forums For Challenging Parochial State Court Decisions.

This Court's continued vigilance in assuring an unequivocal definition of the requirements of a constitutional remedy for an unconstitutional tax and mandating that the states provide this relief is also necessary because of the limited forums available to taxpayers to pursue the available remedies. A taxpayer generally cannot challenge the constitutionality of a state or local tax in the lower federal courts.

U.S. Const. Amend. XI; 28 U.S.C. § 1341. The Eleventh Amendment [6] prohibits suits for monetary damages against a state in federal court and thus prevents all suits for state tax refunds. *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 462 (1945). The Tax Injunction Act, as interpreted, prohibits taxpayers from bringing any action in federal court if there is a "plain, speedy, or efficient" remedy at state law. *Newsweek*, 522 U.S. at 444. Most of the cases interpreting the Tax Injunction Act have determined that state refund or protest systems are plain, speedy, and efficient and thus jurisdiction in the federal courts is generally prohibited. *See, e.g., id.; California v. Grace Brethren Church*, 457 U.S. 393 (1982). While this Court has accepted several state tax remedy cases in the past, review by this Court is anything but guaranteed. Thus, taxpayers are usually limited to a state court as the final arbiter of what is an adequate remedy. In order to remind state courts what constitutes a constitutionally sufficient remedy and that their compliance with this rule is being monitored, COST respectfully requests this Court to accept this case for review.

C. Fairness: The States' Continued Failure To Provide Constitutionally Adequate Remedies Results In a Real Loss of Money and Time by Taxpayers.

Finally, we note why this case has captured the attention of the state tax community. It is not surprising to state that the issue of remedies for unconstitutional taxes is one of the most important issues [7] in state and local tax today. Time and again over the past several years, taxpayers have been denied a constitutional remedy by state courts. This is real money

---

[6] "The Judicial power of the United States shall not be construed to extend to any suit . . . commenced or prosecuted against one of the United States by citizens of another state . . . ." U.S. amend. XI.

[7] The other pressing issues being nexus concerns and discriminatory taxes.

being lost by real taxpayers. With the loss of this money, a certain amount of faith in the system is also lost. Taxpayers' only recourse is to appeal to this Court. States continue to impose unconstitutional taxes, but when a court ultimately invalidates these taxes, many states nevertheless refuse to provide the taxpayer with constitutionally sufficient relief. This situation is a source of significant frustration [8] to taxpayers, and this Court is unfortunately the only forum in which a solution is available. In fact, over the past year the issue of remedies has reached such significance in the state and local tax community that the topic has been a feature of at least three of the major state tax conferences.[9] Perhaps, if the states are forced to confront the true costs of providing a constitutionally adequate remedy, the legislatures will be more mindful in crafting their tax statutes to begin with and will be quicker to address a constitutional problem when it comes to light. If this Court clearly exhibits its intent to enforce the Constitution's remedy rules on the states, states like Alabama (unconstitutional franchise tax) and California (unconstitutional dividends received deduction) [10] may decide

---

[8] The lack of adequate remedies has become a frequent topic of discussion at taxpayer gatherings. Some taxpayers, after years of ultimately successful litigation challenging a tax have taken to cynically waving a dollar bill in the air and commenting that they have not received even one dollar in refunds from the suit. This is a sad commentary on the current system.

[9] Paul J. Hartman (Vanderbilt University Law School) State & Local Tax Forum 2001, New York University State and Local Tax Institute 2001, Georgetown University Advanced SALT Institute 2002.

[10] California is another perfect illustration of the pervasiveness of this problem. California has known since at least this Court's decision in *Fulton Corp. v. Faulkner*, 516 U.S. 325, 346- 47 (1996), that its dividend received deduction was unconstitutional because it discriminated against interstate commerce. However, in those at least six years, California has done nothing, except to resist taxpayer's challenges to the DRD, to fix the offending provision. Continuing such an illegal tax is not just inconvenient to the taxpayers. It fails to provide good fiscal management

in the future not to keep their clearly unconstitutional taxes on their books for a lengthy and ultimately costly fight. Such a result will save the states, taxpayers, and ultimately this Court unnecessary and repetitive litigation. COST and its members hope that this Court will again add light to this important issue.

ARGUMENT

Under the Due Process Clause of the United States Constitution, the Alabama Supreme Court unconstitutionally deprived the Petitioners of their property by retroactively removing previously established procedures on which the Petitioners had relied to remedy an unconstitutional tax.

I. DUE PROCESS REMEDY RULES IN STATE TAX CASES

A remedy for a state tax declared unconstitutional must comply with the requirements of the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[11] *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 100 (1992). Under the Due Process Clause, a remedy is constitutional only if it meets two tests: 1) the remedy must provide either a predeprivation remedy or "meaningful backward looking relief," *id.*; and 2) the remedy must be "clear and certain," *Atchison, T. & S.F.R. Co. v. O'Conner*, 223 U.S. 280, 285 (1912); *McKesson Corp.*, 496 U.S. at 39 n. 22.

In *McKesson*, the Florida Supreme Court found that a Florida tax unconstitutionally discriminated against interstate commerce but provided prospective only relief. The court

---

to the general populace of the state. The bill for the unconstitutionally collected tax just keeps getting bigger and bigger.

[11] "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend. XIV, § 1.

premised its denial of meaningful backward looking relief on its determination that the state relied in good faith on a presumptively valid statute, and the taxpayer would receive a windfall if it received a refund of a tax likely passed on to its customers. *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 524 So. 2d 1000, 1010 (1988). This Court framed the issue before it as "whether prospective relief, by itself, exhausts the requirements of federal law. The answer is no." *McKesson*, 496 U.S. at 31. In reversing the Florida Supreme Court, the *McKesson* Court held that the state must provide "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *Id.* at 36-37 (emphasis added).

In *Reich v. Collins*, 513 U.S. 106 (1994) the taxpayer challenged the constitutionality of a state tax under a statutory refund provision. *Id.* The state tax code provided for both predeprivation challenges (protests) and post-deprivation challenges (refund suits). After the tax was ruled unconstitutional, the state tried to avoid paying the refund by arguing that since the taxpayer could have challenged the tax before paying the tax, the taxpayer had paid the tax voluntarily and no refund was due. *Id.* at 110. This Court soundly rejected that argument. *Id.* at 111.

In a follow-up to *Reich*, the taxpayer in *Newsweek* sought a refund of an unconstitutional tax imposed on certain publications. In reversing the state court, this Court once again noted that under *Reich v. Collins*, the state must not employ a "bait and switch" approach to the availability of remedies. *Newsweek*, 522 U.S. 442.

Thus, the rule is clear: a state has flexibility in the type of relief it provides, but once that relief is available and relied on by injured taxpayers, the state cannot retroactively withdraw it as a choice. This is true even if the state also provided

other procedural remedies in excess of those constitutionally required.

II. ALABAMA'S REMEDY DESIGN AND APPLICATION

Alabama, like many states, provided both administrative and judicial remedies to taxpayers seeking to recover a tax incorrectly collected by the State. In most cases, the administrative procedures must be completed before the taxpayer had a right to proceed to court. Taxpayers' Bill of Rights and Uniform Revenue Procedures Act, Ala. Code 1975, § 40-2A-1 *et seq*. However, as is also common in other states, because the State administrative body does not have authority to rule a tax unconstitutional or illegal, it was considered futile to exhaust the administrative procedures when the only issue raised by the taxpayer was the validity of the tax statute itself. *Graves v. McDonough*, 88 So. 2d 371, 373 (Ala. 1956). Thus, in those circumstances, Alabama courts have for 45 years allowed suits to be brought directly in the court for a refund of an unconstitutional or otherwise illegal tax without first exhausting the fruitless administrative procedures. *See* cases cited at pages 7- 9, *Petitioner's Brief*. The taxpayer's right to pursue a challenge to the legality of a tax statute directly in court is so well established that it was recently specifically upheld in two Alabama appellate court cases. *Monroe*, 749 So. 2d at 473; *Sizermore*, 611 So. 2d at 1067-68. Thus, there is little doubt that the procedure of challenging the legality of a state tax directly in Alabama courts has a long and solid history in the State.

This case, however, changed everything. This case is a class action brought by Petitioners on behalf of foreign corporations who paid franchise taxes to the State of Alabama under the tax scheme ruled unconstitutional in *South Central Bell Telephone*. The Petitioners' complaint sought, among other items, a refund of the previously collected taxes. The Petitioners initially requested an injunction placing the

franchise taxes collected by the State into escrow pending a final determination as to the constitutionality of the tax. Pet. App. 68a-69a. The Alabama Supreme Court denied the escrow because the Petitioners had "an adequate remedy at law."[12] Pet. App. 70a-72a. After this Court ruled the disputed tax unconstitutional, the Commissioner requested dismissal of the Petitioners' case on the theory that the Petitioners had failed to exhaust their administrative remedies and, thus, the Alabama courts lacked jurisdiction. Pet. App. 39a-40a. The Alabama Supreme Court ultimately dismissed the case, finding that because the Petitioners had not exhausted their administrative remedies, which according to the Alabama Supreme Court was the sole procedure for aggrieved taxpayers to obtain a refund, the State had not waived its sovereign immunity from suit in state court and the Alabama courts lacked jurisdiction over the case. Pet. App. 34a. The Alabama Supreme Court determined that exhaustion of the administrative remedies was required notwithstanding a 45-year history and recent state appellate court precedent upholding a direct court action when the only

---

[12] This is another example of the frustrations encountered by the Petitioners in this case. While the constitutionality of Alabama's franchise tax was pending, Alabama continued to collect the tax. It threatened companies that failed to pay with a withdrawal of their privilege to do business in the State. Even though it became clear to the State at some point prior to this Court's decision in *South Central Bell* that the tax was likely invalid (as evidenced by the State's failure to support its constitutionality before this Court) the State still continued to collect the tax. When the Petitioners asked that this tax at issue be put into escrow, the State promised that the Petitioners were not at risk of losing any remedies to which they were entitled so no escrow was necessary. Now that it has come time for Alabama to pay the piper, the State has pulled out every trick in the book—sovereign immunity, latches, exhaustion of remedies, *Chevron* prospectively, equitable need, and several more in a last ditch effort to avoid paying an illegally collected tax. It is embarrassing that a state government would behave like a three year old caught with her hand in the cookie jar.

issue involved the constitutionality of a state statute. App. 29a-33a

Thus, Alabama applied a game enjoyed by small children at play and people teasing pets—dangle a treat in front of your target and snatch it away just as they reach for it. The Alabama Supreme Court's justifications do not support the retroactive withdrawal of a procedural remedy, and therefore the Alabama Supreme Court should be summarily reversed.

III. ALABAMA'S RETROACTIVE WITHDRAWAL OF A PROCEDURAL REMEDY FOR AN ILLEGALLY COLLECTED TAX VIOLATES THE DUE PROCESS CLAUSE.

Alabama, at the very least, had never discouraged the practice of bringing a state tax challenge directly in state court when exhausting the administrative remedies would be futile due to the administrative agency's inability to declare a statute invalid. What does this precedent mean? It means that the judiciary itself accepted the Petitioners' procedural remedy as a valid course in Alabama. *Amicus* understands, and in fact supports, a state's needed flexibility in designing the procedural remedies available to its taxpayers. However, what *amicus* cannot support is the complete withdrawal by the Alabama Supreme Court of an explicit, judicially accepted procedure, *retroactivly*. "Under *McKesson*, [the State] has the flexibility to maintain [a] . . . remedial scheme, so long as that scheme is 'clear and certain.'" *Reich v. Collins*, 513 U.S. at 110-11 (emphasis added). Alabama's insistence on enforcing its unconstitutional tax on the Petitioners, despite the Petitioners' use of a procedure accepted by 45 years of precedent and the Alabama appellate courts, does not amount to a "clear and certain" remedy as required by the Due Process Clause.

As the Petitioners point out, the remedy provided by Alabama Supreme Court violates one of the clear standards already articulated by this Court—a state may not "bait and

switch" in applying a remedy. *Reich v. Collins*, 513 U.S. 106. This is just what Alabama did here: it offered the judicial remedy of a direct to court suit, but when the Petitioners came to court to obtain the advertised remedy, the state basically said—you made a mistake; you trusted us.

This Court is asked once again to specifically direct a state, in this case Alabama, to comply with, and not flout, the Due Process Clause contained in the Fourteenth Amendment to the United States Constitution. Alabama, like several other states,[13] has found itself in the predicament of deciding how to remedy an unconstitutionally imposed tax. Instead of crafting a remedy to correct the discrimination found in its tax through refunds, credits, or some other substantive relief, the State denies the Petitioners a day in court by asserting that the Petitioners pursued the "wrong" procedure. We have seen this before—Florida tried to claim that taxpayers that filed a refund claim rather than protest a tax before payment followed the wrong procedure and thus were precluded from recovery—and this Court has rejected such an action. If this court does not do the same here, it will send a message that incentivizes other state courts, legislatures, and tax agencies to follow Alabama's lead.

---

[13] Some states do understand their obligation under the Due Process Clause to remedy unconstitutionally imposed taxes. Recently, following the finding in *In the Matter of Panhandle Eastern Pipe Line Co. et al.*, Kan. Supreme Ct., No. 86,277 (2002), that a tax benefit was illegally withheld, the state of Kansas announced plans to refund $25 million to the affected taxpayers. One of Kansas' state representatives recognized a fact that Alabama (and Massachusetts and Illinois before it) seems to have failed to internalize. Senate Minority Leader Anthony Hensley (D-Topeka) commented that: "I'm not sure we have any other option at this point . . . . We lost the suit." Alabama, like Kansas, lost the suit and therefore has no other option—it needs to pay up in one form or fashion. Alabama should not be allowed to shirk its obligations while Kansas shoulders its. Obviously, the disparity in the results in these cases demonstrates a need for guidance, and the role of providing such guidance falls squarely on this Court.

CONCLUSION

For the reasons stated above, COST respectfully requests the Court to grant the Petition for Certiorari.

Respectfully submitted,

DOUGLAS L. LINDHOLM *
President/Executive Director
DIANN L. SMITH, General Counsel
STEPHEN P.B. KRANZ, Tax Counsel
WILLIAM D. PELTZ, Chair
BOBBY L. BURGNER, Vice-Chair
J. HUGH MCKINNON, Counsel
Lawyers' Coordinating Subcommittee
COUNCIL ON STATE TAXATION
122 C St., N.W., Suite 330
Washington, D.C. 20001
(202) 484-5215

* Counsel of Record